No. 80-929

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SOL NEIL CORBIN, as Trustee in Bankruptcy of Franklin New York Corporation,

Petitioner,

and

CONNECTICUT GENERAL LIFE INSURANCE COMPANY, *et al.*,

Respondents,

—against—

FEDERAL RESERVE BANK OF NEW YORK, FEDERAL DEPOSIT INSURANCE CORPORATION, in its Corporate Capacity and as Receiver of Franklin National Bank,

Respondents,

and

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Defendant.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT FEDERAL RESERVE BANK OF NEW YORK IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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Counter-Statement of the Questions Presented

The questions presented by the petitioner have as their premise the assertion that the agreements in issue in this case were "inequitable" and the effective annual interest of 7.654% which respondent Federal Reserve Bank may ultimately receive is unfair to the receivership estate. The district court found, after trial, that the agreements were "more than fair" (43a)* and "constituted the best results available on an overall basis" (47a), and the court of appeals affirmed this finding (5a-6a).

The preliminary question to those raised by petitioner —and it does not justify review by this Court—must be:

1. Did the court of appeals err in affirming the district court's finding of fact that the agreements were fair?

Petitioner's claim raises another question the proper answer to which provides an independent ground for sustaining the judgment dismissing the complaint:

2. Does the transaction by which the federal banking authorities prevented the closing of the banking offices of a national bank and facilitated the purchase of its assets and the assumption of its deposit liabilities by another bank— a result which necessitated agreement between the Federal Reserve Bank and the Federal Deposit Insurance Corporation concerning repayment of the Federal Reserve Bank's advances to the failed bank and the release of the collateral for these advances—present a justiciable controversy in the absence of a claim of arbitrary and capricious action by the banking authorities?

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* The appendix to the petition is abbreviated throughout this brief as "___a".

TABLE OF CONTENTS

	PAGE
Counter-Statement of the Questions Presented	i
Table of Contents	ii
Table of Authorities	iii
Counter-Statement of the Case	2
The Franklin National crisis and the banking authorities' solution	2
The discretionary powers of the banking authorities	6
The claim of petitioner	7
The decisions of the district court	8
The decision of the court of appeals	11
Statutory Provisions	12
Reasons for Denying the Writ	12
I. Since The Court of Appeals Found That The "*Vanston/Fleming* Doctrine" Was Satisfied, Certiorari Should Not Be Granted To Determine Whether The "Doctrine" Was Applicable	12
II. The "*Vanston/Fleming* Doctrine" Was Inapplicable	14
III. The Supposed Policy Reasons For Granting Certiorari Are Specious	18
IV. Subject Matter Jurisdiction Of This Action Is Lacking	21
Conclusion	25

TABLE OF AUTHORITIES

Cases	Page
Altman v. *McClintock*, 20 F.2d 226 (W.D. Wyo. 1927), *appeal dism'd.*, 28 F.2d 1007 (8th Cir. 1928)	23n
American Surety Co. v. *Bethlehem National Bank*, 314 U.S. 314 (1941)	18n
British Columbia Investment Co. v. *FDIC*, 420 F.Supp. 1217 (S.D.Cal. 1976)	23n
In re Chetwood, 165 U.S. 443 (1897)	23n
Chicago & Southern Air Lines, Inc. v. *Waterman Steamship Corp.*, 333 U.S. 103 (1948)	22
Citizens to Preserve Overton Park, Inc. v. *Volpe*, 401 U.S. 462 (1971)	22
Consolidated Rock Products Co. v. *DuBois*, 312 U.S. 510 (1941)	16n
Cooper v. *O'Connor*, 105 F.2d 761 (D.C. Cir. 1939)	23
Davis v. *Elmira Savings Bank*, 161 U.S. 275 (1896)	18
Eddy v. *Prudence Bonds Corp.*, 165 F.2d 157 (2d Cir. 1947), *cert. denied*, 333 U.S. 845 (1948)	16
Fahey v. *O'Melveny & Myers*, 200 F.2d 420 (9th Cir. 1951), *cert. denied*, 345 U.S. 952 (1953)	22
Federal Deposit Insurance Corp. v. *Grella*, 553 F.2d 258 (2d Cir. 1977)	23
Fifer v. *Williams*, 5 F.2d 816 (9th Cir. 1925)	23
First National Bank v. *National Exchange Bank*, 92 U.S. 122 (1975)	22n
Fleming v. *Traphagen*, 329 U.S. 686 (1946)	12
In re Franklin National Bank, 381 F.Supp. 1390 (E.D.N.Y. 1974)	4

PAGE

Greene County National Farm Loan Ass'n v. *Federal Land Bank*, 152 F.2d 215 (6th Cir. 1945) *cert. denied*, 328 U.S. 834 (1946) 22n

Hadden v. *Merritt*, 115 U.S. 25 (1885) 22

Huntington Towers, Ltd. v. *Franklin National Bank*, 559 F.2d 863 (2d Cir. 1977) *cert. denied*, 434 U.S. 1012 (1978) 6, 20n, 23

Louisville Joint Stock Land Bank v. *Radford*, 295 U.S. 555 (1935) 16n

Lucas v. *Federal Reserve Bank*, 59 F.2d 617 (4th Cir. 1932) 22n

Marbury v. *Madison*, 5 U.S. (1 Cranch) 137 (1803) 22

Mechanics Universal Joint Co. v. *Culhane*, 299 U.S. 51 (1936) 18

Morris v. *Third National Bank*, 142 F. 25 (8th Cir. 1905), *cert. denied*, 201 U.S. 649 (1906) 22n

Ove Gustavsson Contracting Co. v. *Floete*, 299 F.2d 655 (2d Cir. 1962), *cert. denied*, 347 U.S. 827 (1963) 24

Panama Canal Co. v. *Grace Line, Inc.*, 356 U.S. 309 (1958) 22

Raichle v. *Federal Reserve Bank*, 34 F.2d 910 (2d Cir. 1919) 24

Scott v. *Armstrong*, 146 U.S. 499 (1892) 18

Securities Investor Protection Corp. v. *Barbour*, 421 U.S. 412 (1975) 24

Sexton v. *Dreyfus*, 219 U.S. 339 (1881) 13n

Ticonic National Bank v. *Sprague*, 303 U.S. 406 (1938) .18, 19

United States v. *Key*, 397 U.S. 322 (1970) 16

Vanston Bondholders Protective Committee v. *Green*, 329 U.S. 156 (1946) 12, 14, 15

PAGE

STATUTES

Bankruptcy Act

11 U.S.C. § 109(b)(2) (Supp. III 1979)..... 3n

11 U.S.C. § 574 (1976) 16

22 U.S.C. § 621 (1976) 16

Federal Deposit Insurance Act

12 U.S.C. § 1821(c) (Supp. III 1979) 3

12 U.S.C. § 1823(e) (1976)..... 3, 6, 21

Federal Reserve Act

12 U.S.C. § 341 (1976) 22

12 U.S.C. § 347(b) (1976)..... 2, 6

National Bank Act

12 U.S.C. § 191 (1976) 2, 6

12 U.S.C. § 192 (1976)..... 4, 6, 21

12 U.S.C. § 194 (1976) 18

OTHER AUTHORITIES

Comptroller of the Currency Regulations, 12 C.F.R.

7.6030(c) (1980) 19n

14.2—14.5 (1980)..... 19n

Fed.R.Civ.P.

12(b)(1)..... 8

12(b)(6)..... 8

Federal Reserve Regulation A, 12 C.F.R.

§ 201.1(e)(2) (1980) 2

S.Rep.No. 95-989, 95th Cong., 2d Sess. (1978) 3n

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COUNTER-STATEMENT OF THE CASE

The Franklin National crisis and the banking authorities' solution

In May 1974, Franklin National Bank ("Franklin National"), then the nation's twentieth-largest bank with large foreign exchange commitments, was faced with a severe and well-publicized liquidity crisis. Without access to funds from the Federal Reserve System, the "lender of last resort," a run on the bank that would have forced Franklin National to close its doors was inevitable. It was entirely possible that the closing of Franklin National would have resulted in a bank panic of incalculable national and international proportions. Forty-three years later, Franklin National could have been the Credit Anstalt of the 1970's.

Respondent Federal Reserve Bank of New York ("Reserve Bank"),* like the other Federal Reserve Banks, is authorized by statute to make advances to a member bank facing a liquidity crisis, but only upon collateral "satisfactory" to the Reserve Bank and at rates of interest approved by the Board of Governors of the Federal Reserve System. 12 U.S.C. § 347b (1976) and Regulation A promulgated under the Federal Reserve Act, 12 C.F.R. § 201.2(e)(2) (1980). The Reserve Bank made massive collateralized advances to Franklin National beginning in May 1974. On October 8, 1974, Franklin National was indebted to the Reserve Bank in the amount of $1,723,472,054 (the "Reserve Bank Indebtedness"). The Reserve Bank Indebtedness was secured by over $2.2 billion of collateral. It bore interest at 10% per annum.

On October 8, 1974, the Comptroller of the Currency, after determining as provided by 12 U.S.C. § 191 (1976) that he was "satisfied" that Franklin National was insolvent, appointed the Federal Deposit Insurance Corporation ("FDIC Receiver")

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* The Reserve Bank is a corporation organized under the Federal Reserve Act, the stock of which is owned by member banks established within its Reserve District which receive a 6% return upon the stock's par value. It has no parent, subsidiary or affiliated corporations.

receiver of Franklin National, as is required by 12 U.S.C. § 1821(c) (Supp. III 1979).* So that the doors of Franklin National's 104 banking offices could remain open, FDIC Receiver sold on the same day to the successful bidder, European American Bank & Trust Co. ("EAB"), $1.54 billion of Franklin National's assets selected by EAB, and EAB assumed the deposit and certain other liabilities of Franklin National in the amount of $1.66 billion. FDIC Receiver thus obtained a $125 million premium for the banking business of Franklin National. The public consequences which the closing of Franklin National's banking offices would have brought about were avoided.

On October 8, 1974 FDIC Receiver sold to FDIC in its corporate capacity ("FDIC Corporate") the assets not purchased by EAB (the "remaining assets"). FDIC Corporate is authorized by 12 U.S.C. § 1823(e) (1976), "[w]henever in the judgment of [its] Board of Directors such action will reduce the risk or avert a threatened loss to [FDIC Corporate] and . . . will facilitate the sale of the assets of an open or closed insured bank to and assumption of its liabilities by another insured bank", to purchase the assets of an insured bank "upon such terms and conditions as [FDIC Corporate] may determine. . . ." As the purchase price for the remaining assets, FDIC Corporate assumed the Reserve Bank Indebtedness as primary obligor and agreed to remit to FDIC Receiver the proceeds of liquidation after repayment of the principal of and the interest upon the Reserve Bank Indebtedness (as well as the expenses of liquidation and the principal of and interest upon any amounts advanced by FDIC Corporate).

The Purchase and Assumption Agreement between FDIC Receiver and EAB and the Agreement of Sale between FDIC Receiver and FDIC Corporate, along with the annexed Indebt-

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* Congress has expressly excluded national banks from the Bankruptcy Act, 11 U.S.C. § 109(b)(2) (Supp. III 1979), as "they are bodies for which alternate provision is made for their liquidation under various . . . Federal regulatory laws." S. Rep. No. 95-989, 95th Cong., 2d Sess. 31 (1978).

edness Assumption Agreement among FDIC Corporate, the Reserve Bank and FDIC Receiver were submitted on October 8, 1974 for district court approval. The National Bank Act, 12 U.S.C. § 192 (1976), provides for the sale by the receiver of the property of an insolvent national bank pursuant to court order "on such terms as the court shall direct." The agreements were approved by the district court as "not arbitrary" and as the "best solution to a serious and delicate problem." *In re Franklin National Bank*, 381 F.Supp. 1390, 1393 (E.D.N.Y. 1974).

These transactions depended upon the Reserve Bank's agreement to release its lien upon the $2.2 billion of collateral securing the Reserve Bank Indebtedness and the Reserve Bank's agreement to forbear for three years from collecting the Reserve Bank Indebtedness. During the summer of 1974, it had become apparent that to enable a number of interested banks to bid for Franklin National's business if it were declared insolvent, the Reserve Bank Indebtedness would have to be excluded from the bidding package since potential bidding banks were not willing to assume so large a liability. Provision would have to be made for repayment of the Reserve Bank Indebtedness from a source other than the collateral, which consisted of Frankin National's assets most desirable to prospective purchasers of its business. FDIC as Receiver of Franklin National was not, of course, able to repay the Reserve Bank Indebtedness and at the same time sell $1.54 billion of Franklin National's desirable assets to the successful bidder. The only other possible source of repayment was the insurance fund of FDIC Corporate. FDIC Corporate believed, however, that it could not advance to FDIC Receiver the $1.7 billion necessary to pay off the Reserve Bank Indebtedness, thereby depleting the $6.0 billion FDIC insurance reserve by some 30%, without seriously affecting public confidence in the insurance protection for deposits and in the banking system. FDIC Corporate feared that this might precipitate the bank panic which the earlier actions of the federal banking authorities had been designed to avoid. There has been no other

situation in which a Federal Reserve Bank has had to make advances to a national bank so massive that FDIC Corporate did not believe it could prudently repay them out of its insurance fund on the day of the purchase and assumption transaction.

The Reserve Bank, with the approval of the Board of Governors of the Federal Reserve System, agreed to release its lien on the collateral so that the sale of Franklin National's business to EAB might be effected, to forbear from enforcing the Reserve Bank Indebtedness for three years pending the liquidation of the remaining assets purchased by FDIC Corporate and to look to FDIC Corporate as primary obligor in the event of a short-fall. FDIC Corporate agreed to pay interest on the unpaid balances of the Reserve Bank Indebtedness at a nominal rate of 7.52% (less up to $15 million of liquidation expenses) which, if the proceeds of liquidation ultimately proved sufficient, would be increased to an amount calculated on the basis of interest at 8.5% compounded annually over the three-year forbearance period (but not thereafter). (The increase has been sometimes referred to as the "interest rate differential" or, more colloquially, as the "kicker".)

The 7.52% simple rate was a nominal rate. It was to be paid only at the end of three years, although interest is normally paid semi-annually. Payments by FDIC Corporate to the Reserve Bank were applied first to reduction of the principal amount of the Reserve Bank Indebtedness rather than, as is normal commercial practice, being first applied to accrued interest. It was estimated that this provision would produce a benefit of $26 million to the Franklin National estate as compared to the commercial practice; in fact, the benefit proved to be $34 million. In addition, the interest payment made at the end of three years was further adjusted by the deduction of $15 million for expenses of liquidation ($5 million in each of the three years).

On October 7, 1977, the Reserve Bank received the first element of the agreed-upon consideration, less the $15 million

adjustment for liquidation expenses. Although based on a nominal 7.52% rate, the amount paid was actually equivalent to an *effective annual yield of 6.485%*. The Reserve Bank has yet to receive any part of the interest rate differential. If the proceeds of the liquidation ultimately prove sufficient and if, hypothetically, the Reserve Bank is paid in full as early as April 7, 1985, the Reserve Bank will have received including the interest rate differential an *effective annual yield of 7.654%*.

The discretionary powers of the banking authorities

The Franklin National purchase and assumption transaction was consummated by the federal banking authorities in the exercise of the discretionary powers given them by the Federal Reserve Act, the National Bank Act and the Federal Deposit Insurance Corporation Act to deal with bank crises.

In order to stave off the consequences of a bank liquidity problem, the Federal Reserve Banks are authorized to make advances collateralized to their satisfaction in addition to their usual discount window operations, 12 U.S.C. § 347b (1976). Insolvency of a national bank depends upon whether the Comptroller of the Currency is satisfied concerning the insolvency, 12 U.S.C. § 191 (1976). The receiver of a national bank, which must be the FDIC, may sell the bank's assets on such terms as the district court approves, 12 U.S.C. § 192 (1976). The FDIC is empowered to purchase bank assets from itself as receiver on such terms as it determines, 12 U.S.C. § 1823(e) (1976).

In *Huntington Towers, Ltd.* v. *Franklin National Bank*, 559 F.2d 863 (2d Cir. 1977), *cert. denied*, 434 U.S. 1012 (1978), which involved the earlier stage of the Franklin National crisis, the court of appeals affirmed, "on the ground of lack of subject matter jurisdiction" (559 F.2d at 869), the dismissal of a complaint which alleged that the Reserve Bank's advances to Franklin National had been improperly made with knowledge of Franklin National's insolvency. The court held that the claim was not justiciable since the actions of the banking authorities

had been taken in the exercise of judgment within their competence and authority:

> "Both the fixing of the date of the declaration of insolvency by the Comptroller [of the Currency] and the granting of rescue funds to [Franklin National] by the [Reserve Bank] were exercises of judgment by the public officials concerned and were well within their competence and authority. Absent clear evidence of grossly arbitrary or capricious action on the part of either or both of them—a factor which does not appear to be present here—it is not for the courts to say whether or not the actions taken were justified in the public interest, particularly where it vitally concerned the operation and stability of the nation's banking system." (559 F.2d at 868)

The claim of petitioner

Petitioner ("Corbin") is the trustee in bankruptcy of Franklin New York Corporation, Franklin National's holding company.* In addition to the stock of Franklin National, the holding company holds subordinated debt instruments denominated and classified on Franklin National's balance sheet as subordinated "capital" notes or debentures and has a general creditor's claim of $136,000.** Corbin seeks to set aside one, but only one, aspect of the three agreements which provided a $125,000,000 premium to the receivership estate, allowed the continuation of Franklin National's banking business and avoided an immediate 30% reduction in the FDIC deposit insurance fund. Corbin does not propose to refund any

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* A number of other institutional holders of subordinated capital debt, led by Connecticut General Life Insurance Company, intervened in the district court and appealed to the court of appeals. They did not, however, join in Corbin's petition for rehearing and rehearing in banc in the court of appeals and have not petitioned this Court.

** Since the outcome of the liquidation of Franklin National is not known, the increase in its assets sought by Corbin may be solely for his benefit as Franklin National's stockholder rather than as a subordinated creditor.

part of the $125 million premium. He directs his attack only to the provisions providing for payment of interest to the Reserve Bank in exchange for its release of the collateral and its forbearance for three years in collecting the indebtedness. Despite Corbin's comments about "a greedy Federal Reserve" (Pet. p. 5), his real grievance apears to be that the Reserve Bank was not willing to subsidize the estate of Franklin National at the expense of the Treasury with below market rates of interest.*

The rates of interest which FDIC Corporate agreed to pay the Reserve Bank were less than market interest rates prevailing on October 8, 1974 for three-year maturities. The 8.5% nominal rate of the interest rate differential was also below the rate being charged by the Treasury to Government agencies for three-year loans payable semi-annually. Unlike the obligations of Government agencies, the 8.5% nominal rate is only payable if and when there are sufficient proceeds from the liquidation of the assets of Franklin National remaining after EAB had selected $1.54 billion of Franklin National's assets.

The decisions of the district court

The FDIC and the Reserve Bank moved, pursuant to Fed. R.Civ.P. 12(b)(1) and 12(b)(6), to dismiss Corbin's complaint for lack of subject matter jurisdiction and for failure to state a claim. The district court (Pollack, D.J.) ruled that since the motion made by FDIC admitted for purposes of the motion the allegations that it had a duty to Corbin and had breached that duty, Corbin's claim that the interest terms were unfair was justiciable and required a hearing (19a). The district court stated that "as to the Receiver, the fairness of the terms to which it agrees are not beyond the scope of traditional judicial

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* The Reserve Bank pays virtually all of its net income into the Treasury after providing a fixed return of 6% upon the par value of its stock to its member bank stockholders and transfers to surplus. In 1979, for example, 98.87% of the Reserve Bank's income was paid into the Treasury. Any reduction of the interest owed the Reserve Bank would be at the expense of the taxpayers.

review" (*ibid.*). We believe, as is shown in Point IV within, that the district court erred in this ruling. The district court dismissed the other counts (20a), and Corbin did not challenge these dismissals. Because Corbin conceded he sought no relief against the Board of Governors of the Federal Reserve System, it was dismissed as a party defendant (*ibid.*).

After a two-day bench trial in June 1979, the district court held that there was no basis for imposing a duty on the Reserve Bank to supply funds to the receivership estate at a below-market interest rate:

> "The Federal Reserve Act was enacted to give the country an elastic currency, to provide facilities for discounting commercial paper and to improve supervision of banking. Its purposes do not include overriding of the public's interest by preferred or special or concerned treatment of holders of subordinated debentures and stock of insolvent banks. It has no obligation at the expense of the general taxpayer to subsidize money lenders to banks which become insolvent or their stock investors, or to supply term loans at below-market or non-commerical rates of interest, directly or indirectly or for the benefit of FDIC as Receiver of insolvent banks. Nor is it obliged to discount commercial paper at rates more favorable after insolvency than before insolvency of a member bank. It is the public interest that the Federal Reserve Bank must serve" (40-41a).

The district court found that, in light of the economic uncertainties at the time and the unpredictability of interest rates, the choice by the FDIC of a fixed, rather than a floating rate, was reasonable and that the agreements were not arbitrary or capricious:

> "The give and take of the negotiation of the Agreement of Assumption of Indebtedness in which final provisions for fixed and contingent interest became an integral part included many permutations and combinations and com-

promises of a variety of complex matters. The choice made by the Receiver not to risk the rollercoaster of Reserve Bank discount rates, in a nervous economy, cannot be faulted as a breach of fiduciary duty of the Receiver by a hindsight wisdom developed after the storm had spent itself, long after the deal closed. The shelter of a fixed rate was a rational choice that the Receiver was privileged to make in administering the interests of the Estate. In 1974, a respectable body of opinion was against gambling on the future cost of money. The agreements were neither arbitrary nor capricious" (42a).

The district court found that the consideration charged by the Reserve Bank was "more than fair":

> "In light of these criteria, the interest rate charged by FRB-NY was more than fair to the receivership estate. The rate provided in the Assumption Agreement, even if the contingent amount is fully paid, afforded a yield below the relevant market rates, the contract rates of the FNB notes (8 1/2%, later 10%), and the legal lending rate set by the New York Banking Board under N.Y. Gen. Oblig. Law § 5-501(1) (8 1/2%). Under all the facts and circumstances, plaintiff's claim that the FRB-NY rate was unfair falls to the ground. The plaintiff has failed to sustain a claim of unfairness with credible evidence" (43a).

Finally, the district court found and concluded that all aspects of the October 8, 1974 transaction were "legal and well within the range of reason":

> "Upon consideration of all of the evidence and resolving the issues of credibility and in the light of the unprecedented circumstances prevailing at the time I find and conclude that it has been credibly established that all aspects of the October 8, 1974 transactions were legal and well within the range of reason and constituted the best results available on an overall basis. The Receiver did not

profit at the expense of the Estate, it exercised sufficiently informed reasonable business judgment and the challenged aspects of the transactions were fair and not a breach of its fiduciary duty to the creditors and stockholders of Franklin National Bank" (47a).

The decision of the court of appeals

On July 16, 1980, the court of appeals (Oakes and Meskill, C.JJ. and Bonsal, D.J.) affirmed the judgment, based in large part on the district court opinion which was expressly adopted (5a-6a). Judge Oakes, who wrote the decision for the panel, "merely [took the] opportunity to explore a little further the *Vanston* [*Bondholders Protective Committee* v. *Green*, 329 U.S. 156 (1946)] arguments of appellant" (*ibid.*). He said that the *Vanston* decision had no applicability to a case concerning post-involvency agreements made by a receiver of a national bank. Further, he said that the circumstances in *Vanston* and the principles of that decision did not "suggest any impropriety in the transaction at issue here," concluding, as had the district court, that the agreements were not inequitable.

The panel also affirmed the October 6, 1978 decision of the district court which denied in part the motions made by the FDIC and the Reserve Bank to dismiss the complaints. The district court's September 4, 1979 opinion, insofar as it found that the FDIC had not breached any fiduciary duties or engaged in improper "self-dealing", was also expressly affirmed by the court of appeals (4-6a). Corbin's petition for rehearing and petition for rehearing in banc were denied (50-53a).

STATUTORY PROVISIONS

The appendix to this brief sets forth the following pertinent statutory and regulatory provisions:

National Bank Act—12 U.S.C. §§ 191, 192, 194 (1976)

Federal Reserve Act—12 U.S.C. §§ 341, 347b (1976)

Regulation A—12 C.F.R. § 201.2(e)(2) (1979)

Federal Deposit Insurance Act—12 U.S.C. §§ 1819, 1821, 1823 (1976)

Bankruptcy Act—11 U.S.C. § 22 (1976); 11 U.S.C.A. 109(b)(2) (1979)

REASONS FOR DENYING THE WRIT

I

Since The Court Of Appeals Found That The "*Vanston/Fleming* Doctrine" Was Satisfied, Certiorari Should Not Be Granted To Determine Whether The "Doctrine" Was Applicable

Vanston Bondholders Protective Committee v. *Green*, 329 U.S. 156 (1946) involved a reorganization proceeding under Chapter X of the Bankruptcy Act. This Court did not permit mortgage bondholders to recover interest on interest pursuant to the indenture for the period after insolvency since the receiver had been directed by the district court not to pay interest on any debt. The Court held that "[i]n this case, where by order of the court interest was left unpaid, we do not think that imposition of interest on that unpaid interest can be justified by 'an application of equitable principles' " (329 U.S. at 165, citation omitted). *Fleming* v. *Traphagen*, 329 U.S. 686

(1946), a *per curiam* decision, applied *Vanston* to a railroad reorganization.*

Corbin argues at great length that the "*Vanston/Fleming* doctrine" is applicable here and the courts below should have determined the "balance of equities". Both the district court and the court of appeals found, however, that in fact the transactions in issue satisfied *Vanston* and then went on to hold that, in any event, the *Vanston* precedent was not applicable. It would be a purely academic exercise to grant *certiorari* to determine the applicability of a precedent which, if it applied, was satisfied. Corbin's claim that the lower courts did not properly determine the factual question of the "balance of equities" in this complex and unique set of circumstances does not raise an issue requiring review by this Court.

Corbin also claims that *Vanston* absolutely forbids post-insolvency interest on interest regardless of the circumstances. The lower courts held that *Vanston*, if applicable, was not so rigid, and that, in any event, the interest rate differential did not include interest upon interest.** Given that factual deter-

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* In *Sexton* v. *Dreyfus*, 219 U.S. 339 (1881), cited at length by Corbin, the collateral was insufficient to satisfy the claim of a creditor, who was forced to proceed against the bankrupt's estate. No national bank was involved and the decision, like the others cited by Corbin, is irrelevant. In any case, Corbin concedes, as he must, that the collateral here was sufficient to cover all of the Reserve Bank's claims. (Pet. pp. 14-15)

** All that is involved is the payment of an additional amount, to the extent that the proceeds of liquidation are sufficient, which is measured in part by what would have been produced by compound interest over a three year period. Once that period is over, the amount of the additional payment does not increase no matter how long payment is delayed (if it is in fact ever made). The provision for measuring the additional amount by what compound interest would have produced only compensates—but imperfectly—for the fact that during the three year period the simple interest of 7.52% was not calculated according the standard commercial practice with interim payments being applied to accrued simple interest. That departure from ordinary practice produced a benefit to the receivership estate of $34.3 million, which may be compared with the compounding element of $30.2 million. The receivership estate is thus better off by $4.1 million than if it was not required to make any additional payment but had been required to follow commercial practice with respect to the calculation of the 7.52% simple interest.

mination, the "issues" which Corbin seeks to review do not arise on this record.

II

The "*Vanston/Fleming* Doctrine" Was Inapplicable

Corbin's exegesis of what he calls the "*Vanston/Fleming* doctrine" does not address several dispositive distinctions.

1. Unlike *Vanston*, this case does not involve a pre-insolvency agreement, but an agreement made at the moment of insolvency that benefited the estate by returning to it the collateral held by the Reserve Bank. The collateral was thereby made available to EAB in a transaction which produced a premium of $125,000,000 to the estate and made possible the orderly liquidation of the remaining assets.

Moreover, this is not a case, as was *Vanston*, of a court-ordered suspension of the obligation to pay which can be assumed to benefit all creditors. The Reserve Bank's forbearance was neither compelled nor in its narrow economic interest. The Reserve Bank nevertheless agreed to forbear because of public policy considerations. In effect, Corbin insists upon the right to fragment a complex series of transactions by the federal banking authorities, the overall effect of which was to benefit the estate and the national economy. He would accept those provisions which were detrimental to the "self-interest" of those authorities—if such a concept makes sense—but would attack the counterpart provisions by importing concepts from ordinary bankruptcy or reorganization proceedings. Such bankruptcy or reorganization concepts, which assume creditors acting only in their individual self-interest, are not applicable in these unique circumstances.

The court of appeals held that:

> ". . . [T]he principles enunciated in *Vanston* do not, in our view, suggest any impropriety in the transaction at issue here. *Vanston* disallowed on equitable grounds a

> claim for interest on unpaid interest, based on a pre-solvency contract, because the delay in interest payments was occasioned by a court order entered equally for the benefit and to the detriment of all creditors. Here, on the other hand, it was FRB's release of its lien and its agreement to forbear from collection of the debt for three years—an agreement entered into after insolvency so that the receivership estate would receive a $125 million premium (from a sale of the assets to EuropeanAmerican Bank) and the FDIC insurance fund would not be impaired—that resulted in the interest obligations in question. *Vanston* does not go to such a post-insolvency agreement, where there has been performance by the forbearing party and approval by the district court in accordance with the banking statute" (9a).

If the liquidation of Franklin National eventually permits the payment to the Reserve Bank of the interest rate differential, the Reserve Bank will not receive an "added compensation or penalty" for a failure to pay when there has been a "legal suspension of an obligation to pay" as was the case in *Vanston* (329 U.S. 166-67). The Reserve Bank both legally and practically could have satisfied the principal of and interest upon the Reserve Bank Indebtedness of $1.7 billion, as well as any related expenses, out of the over $2.2 billion collateral it held. No statute or court order would have prevented the Reserve Bank from doing so, and the collateral consisted of Franklin National's most desirable assets.

The Reserve Bank's collateral—released to enable EAB's purchase of Franklin National's going business—was entirely different from the assets that were left in the Receiver's hands after EAB had made its selection of purchased assets. The amount of time that it will take the FDIC to liquidate all of Franklin National's remaining assets is irrelevant to the nature of the collateral which the Reserve Bank gave up. The Reserve Bank Indebtedness could have been promptly satisfied from

the collateral as is evidenced by the fact that EAB purchased $1.54 billion of the assets of Franklin National and that within a year another $510 million of the assets not sold to EAB had been liquidated, or an aggregate liquidation of $2.05 billion of Franklin National assets within one year, more than enough to cover the principal of $1.7 billion and $129 million of interest for one year at the 8.5% rate.

2. Corbin, in attempting to create a parity between secured and unsecured creditors, relies upon a term used in the bankruptcy statutes governing corporate reorganizations—a bankruptcy court may approve a plan which compromises or affects creditor rights if it is otherwise "fair and equitable", 11 U.S.C. § 574, 621 (1976). But even in corporate bankruptcy proceedings, as this Court has said, "the words 'fair and equitable' . . . are terms of art, and no plan can be 'fair and equitable' which compromises the rights of senior creditors in order to protect junior creditors," *United States* v. *Key*, 397 U.S. 322, 327 (1970). *See also Eddy* v. *Prudence Bonds Corp.*, 165 F.2d 157 (2d Cir. 1947), *cert. denied*, 333 U.S. 845 (1948), relying upon *Vanston* and holding that a senior group of bondholders were entitled to priority as to full interest and principal until payment.*

The court of appeals described the difference between the bankruptcy statutes and the entirely separate statutory and factual context in which this case arose, explaining that the *Vanston* case:

> "was decided under the Bankruptcy Act, which explicitly exempts banks from its provisions. 11 U.S.C. § 22 (1976). This exemption has important consequences. The assets of

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* These principles follow from the rule of "absolute priority" which governs reorganization cases, *see, e.g., Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555, 586 (1935); *Consolidated Rock Products Co.* v. *DuBois*, 312 U.S. 510 (1941).

> a debtor in reorganization or in liquidation, unlike those of a bank in receivership, are in the custody of the court. *Id.* §§ 11, 516. The court, in reorganization proceedings like that in *Vanston*, has a duty to approve and confirm only those plans that are "fair and equitable." *Id.* §§ 574, 621(2). This fairness concept has a distinct statutory function in the context of reorganization in that it is related to the provision that a court may stay enforcement of a lien, *id.* § 513, and may materially and adversely affect a claimant's rights if two-thirds of the claimants in the same class agree, *id.* § 579. Speaking more generally, it is clear that special equity considerations are in play in a reorganization proceeding, where the goal is to restore a corporation to health by altering arrangements with its creditors and stockholders, but without neglecting the relative positions of these parties beforehand. *See generally* 6 *Collier on Bankruptcy* 0.09 (1978). Because the powers and goals of a bank receiver are quite different, equitable principles developed in the reorganization context cannot simply be grafted onto the national banking statutes. *See In re Stirling Homex Corp.*, 579 F.2d 206, 211 n.8 (2d Cir. 1978), *cert. denied*, 439 U.S. 1074 (1979) (the National Bank Act is 'an entirely different statutory scheme . . . under which distribution is to be " 'ratable' " rather than "fair and equitable" ')" (7-8a).

If the Reserve Bank had pursued its "self-interest" regardless of the public impact, it could have proceeded against the collateral to satisfy its lien and it would not have had to "claim" as against the receivership estate. (*Cf.* Pet. pp. i, 2-3) As a secured creditor of a national bank, the Reserve Bank's rights to the collateral would not have been affected by the appointment of a receiver. National banks are not subject to a judicially supervised liquidation, nor to a contest between claimants in such a proceeding.

Unlike the Bankruptcy Act, the National Bank Act does not provide that a lien can be affected by insolvency.* Under the National Bank Act, "[t]he requirement as to ratable dividends is to make them from what belongs to the bank, and that which at the time of the insolvency belongs of right to the [creditor] does not belong to the bank", *Scott* v. *Armstrong*, 146 U.S. 499, 510 (1892). The provision of the Act, 12 U.S.C. § 194 (1976), that provides for ratable dividends on creditors' claims requires only "just and equal distributions of the assets of national banks among all *unsecured* creditors . . .", *Davis* v. *Elmira Savings Bank*, 161 U.S. 275, 284 (1896) (emphasis supplied); *see also Mechanics Universal Joint Co.* v. *Culhane*, 299 U.S. 51, 55 (1936). The collateral held by the Reserve Bank would not become part of the receivership estate until its claim for principal and interest was fully satisified. This Court so held in *Ticonic National Bank* v. *Sprague*, 303 U.S. 406, 412 (1938), explaining that there is nothing inequitable in such a procedure.

III

The Supposed 'Policy Reasons' For Granting Certiorari Are Specious

Corbin asserts that the alleged refusal of the courts below to apply the "*Vanston/Fleming* doctrine" to the claim of the Reserve Bank will discourage new sources of capital for national banks and frustrate the "reasonable expectations" of unsecured bank lenders that the "doctrine" will operate to protect them in the event of insolvency. The reality is that the

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* A secured creditor of a national bank has more rights than a secured creditor in bankruptcy even with respect to the assets not subject to his lien. He can assert the full amount of his claim against the estate without regard to the amount of his collateral, from which he can also collect principal as well as interest accruing during the receivership until he is paid in full. In contrast, a secured creditor in bankruptcy can only assert against the estate the amount of his claim left unsatisfied from the collateral. *American Surety Co.* v. *Bethlehem National Bank*, 314 U.S. 314, 319 n.1 (1941).

availability of bank capital subordinated to deposit liabilities depends, apart from expectations as to bank profitability, upon the ability and willingness of the banking authorities to prevent bank panics and thus to avoid waves of bank insolvencies, not upon the application of such an obscure "doctrine" when insolvency has occurred. Corbin's contention that the courts should second-guess the banking authorities is, if anything, more likely to diminish investor confidence.

Corbin's assertion is, in reality, that national banks will be unable to raise capital unless unsecured, subordinated lenders know that the Federal Reserve Banks will act as lender of last resort for troubled national banks at below-market or subsidized rates of interest. There is no reason to believe that this is so, and certainly there is no indication that Congress believed that creditors of national banks, other than depositors, required special consideration. Federal regulations provide that banks may raise new capital by borrowings only if the borrowings are expressly subordinated to the claims of general creditors,* and such subordinated lenders cannot claim to have relied upon the possibility that upon insolvency a court would place them on a par with general creditors, much less with secured creditors.

Congress intended that as a secured creditor, a Federal Reserve Bank would have rights superior to those of general creditors, subordinated creditors or stockholders as to both principal and post-insolvency interest, *Ticonic National Bank* v. *Sprague*, 303 U.S. 406 (1938). The statute pursuant to which the advances were made also requires that they bear interest at rates set by the Board of Governors.** No basis exists for

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* The Comptroller of the Currency's regulations concerning changes in capital structures permit national banks to raise capital by issuance of stock or capital debentures, 12 CFR § 14.2-14.5 (1980), but capital debentures must be subordinated to the bank's obligations to depositors and other creditors. Interpretive Rulings, 12 CFR § 7.6030(c) (1980).

** The Federal Reserve System was criticized in Congress during the Summer and Fall of 1974, particularly by Senator Proxmire, for not exacting a higher rate of interest from Franklin National prior to its insolvency.

inferring that Congress intended that a corporate reorganization concept should provide an argument for the subsidization of private investors in failed national banks at the expense of the taxpayers.

Corbin claims that the Reserve Bank will obtain a "windfall" because the agreement provides for a higher rate of return than, as it turned out, the Reserve Bank "would have earned on its own funds" (Pet. p. i). His reference is to the average rate of return over three years on government securities held in the Federal Reserve System Open Market Account ("SOMA") which consists of government obligations. The Federal Reserve System sells or buys government securities as monetary policy may require.* Corbin ignores the fact that the securities in which SOMA's funds are invested are marketable Government obligations, entirely unlike the Reserve Bank Indebtedness. Moreover, interest is paid upon the SOMA securities at least semi-annually so that such interest can be reinvested, while the interest rate differential is wholly contingent and deferred. Higher interest on an illiquid investment, *a fortiori* where payment of the interest is contingent and long delayed, is not "inequitable" or a "windfall".

More fundamentally, the monetary operations that influence the SOMA rate do not have a profit motive. Rather, they are undertaken to control the supply of money and interest rates. That over a given period the Federal Reserve System in fact

* Corbin now relies on—and misparaphrases—a July 1974 letter from Chairman Burns to Senator Proxmire, explaining the Reserve Bank's emergency day-to-day collateralized loans to Franklin National before it was declared insolvent and when it was entitled, by regulation and by statute, to the rates available only to member banks. He did *not* say that the appropriate rate would be what the Reserve Bank would have earned for the Treasury. Moreover, as Chairman Burns explained, the availability of the "discount windows" of Federal Reserve Banks is an important benefit of membership in the Federal Reserve System. Member banks are required to maintain interest-free balances with their Federal Reserve Bank and were therefore offered the availability of short-term advances and such services as check clearing in return; *see also Huntington Towers*, *supra*, 559 F.2d at 868. None of these considerations is pertinent to the situation presented here.

makes much or little return on a portfolio purchased or sold in pursuit of such public policy goals is not determinative of the market rate existing at the outset of the period.

Finally, Corbin's suggestion that the decision below will permit post-insolvency interest claims to "devour" (Pet. p. 7) the estates of insolvent national banks ignores the fully collateralized position of the Reserve Bank prior to October 8, 1974—collateral which the Federal Reserve Act required the Reserve Bank to obtain in making its emergency advances. In contrast, as Corbin observes, "secured debt is neither a common nor a practical method for obtaining public bank capital" (Pet. p. 8). The only effect of the holding below that the so called "*Vanston/Fleming* doctrine" was not violated will be to preserve the freedom of action of federal banking authorities.

IV

Subject Matter Jurisdiction Of This Action Is Lacking

The court of appeals did not reach the question, which it found "vexing" (4a-5a, n.1), whether some more limited scope of review should be applied to the decisions of the banking authorities. We submit, however, that if *certiorari* were granted this Court should affirm for lack of subject matter jurisdiction.

Once the Comptroller of the Currency is "satisfied" that a national bank is insolvent, he appoints the FDIC receiver. Thereafter the FDIC as receiver may decide to sell the assets of the failed bank "on such terms as the [district court] shall direct", 12 U.S.C. § 192 (1976). The FDIC in its corporate capacity may decide to buy such assets "[w]henever in the judgment of the Board of Directors [of the FDIC] such action will reduce the risk or avert a threatened loss to the Corporation" and "upon such terms and conditions as [FDIC Corporate] may determine." 12 U.S.C § 1823(e) (1976). The Reserve Bank may agree to adjust its rights as a secured creditor

to facilitate a sale and the purchase and assumption agreement pursuant to the Reserve Bank's "incidental" powers, 12 U.S.C. § 341 (1976).*

The banking authorities—in weighing, on the one hand, the desirability of keeping open Franklin National's banking offices (by means of the purchase and assumption transaction) and the concern of FDIC Corporate about the impact upon public confidence of the depletion of its insurance fund against, on the other hand, the claims of the Treasury and the taxpayers for compensation for the Reserve Bank's three-year forbearance—were dealing with public matters, with *res publicae*. These are matters explicitly committed by Congress to the discretion of the banking authorities and are not subject to judicial review. *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 170 (1803). There are no statutory standards—"no law to apply"—by which a court may judge the decisions which were made. *Cf. Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 413 (1971); *Hadden* v. *Merritt*, 115 U.S. 25, 28 (1885); *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 318-19 (1958). The decisions made required special expertise and judgment. *Cf. Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948); *Fahey* v. *O'Melveny & Myers*, 200 F.2d 420, 472-73 (9th Cir. 1952), *cert. denied*, 345 U.S. 952 (1953).

The setting of the interest rate provisions, which the district court characterized as "really a political or philosophical problem" (39a), was just as much an exercise of judgment within

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* This provision has been interpreted to allow Federal Reserve Banks to exercise, *inter alia*, the powers granted national banks, which include as a necessary incident to the authority to make loans, the general authority to adjust security interests by means which might otherwise be unauthorized, or even prohibited, in the ordinary course of their business. *Lucas* v. *Federal Reserve Bank*, 59 F.2d 617, 620 (4th Cir. 1932); *First National Bank* v. *National Exchange Bank*, 92 U.S. 122, 127-29 (1875); *Morris* v. *Third National Bank*, 142 F.25 (8th Cir. 1905), *cert. denied*, 201 U.S. 649 (1906); *see also Greene County National Farm Loan Ass'n* v. *Federal Land Bank*, 152 F.2d 215, 218-20 (6th Cir. 1945), *cert. denied*, 328 U.S. 834 (1946).

the competence and authority of the responsible officials as were the Reserve Bank's collateralized advances to Franklin National unsuccessfully attacked in *Huntington Towers*. Like the plaintiff there, Corbin does not claim arbitrary or capricious conduct and, as was true there, no "clear evidence of grossly arbitrary or capricious action" (559 F.2d at 868) exists here.

The FDIC as receiver of a national bank such as Franklin National also occupies a unique position. Unlike a trustee in bankruptcy, "the receiver of an insolvent national bank appointed by the Comptroller is not an officer of the court . . ., and . . . none of the bank's assets, while in the hands of the receiver are . . . in *custodia legis* . . .," *Federal Deposit Insurance Corp.* v. *Grella*, 553 F.2d 258, 262 (2d Cir. 1977).* The sale by FDIC Receiver of the assets of Franklin National "on such terms as the court shall direct", 12 U.S.C. § 192 (1976), is deemed to be a final executive decision, which cannot be appealed and can only be collaterally attacked for fraud or illegality. *See, e.g., Fifer* v. *Williams*, 5 F.2d 286 (9th Cir. 1925); *Cooper* v. *O'Connor*, 105 F.2d 761, 763 (D.C. Cir. 1939). This rule, formulated when individuals acted as bank receivers, is the corollary of the "grossly arbitrary or capricious" test applicable to the decisions of the Reserve Bank and the FDIC in its corporate capacity.

Both the decision to make the emergency advances in the first place and the agreement upon the provisions of the Indebtedness Assumption Agreement required immediate and final action. The entire emergency rescue plan, as the district court observed, required "a global negotiation of a series of

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* A receiver of a national bank is "not the officer of any court but the agent and officer of the United States." *In re Chetwood*, 165 U.S. 443, 458 (1897). Although the receiver "may be in a sense a trustee for the creditors of a defunct bank he is not subject to the general equity rule that a trustee is . . . amenable to an accounting to his cestui que trust," *Altman* v. *McClintock*, 20 F.2d 226, 230-31 (W.D. Wyo. 1927), *appeal dism'd*, 28 F.2d 1007 (8th Cir. 1928). Unlike an ordinary receiver, the FDIC cannot be removed. *British Columbia Investment Co.* v. *FDIC*, 420 F.Supp. 1217, 1225 (S.D.Cal. 1976).

interdependent and complex matters" (25a). Such plans can work only if depositors, solvent banks willing to bid for the assets and business of a failed bank, Federal Reserve Banks and other necessary parties can all rely on decisions made in good faith. Here, as in *Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412, 422-23 (1975), judicial review would frustrate the very purpose for which Congress granted discretion to federal officials to act. *See also Ove Gustavsson Contracting Co.* v. *Floete*, 299 F.2d 655, 659 (2d Cir. 1962), *cert. denied*, 347 U.S. 827 (1963); *Raichle* v. *Federal Reserve Bank*, 34 F.2d 910 (2d Cir. 1929).

What is wholly absent from the petition is any recognition that the statutory and regulatory scheme governing national banks is fitted to their particular—and vital—position in the national economy and that the demise of Franklin National was a crisis of the first magnitude for the banking system—a crisis which was weathered only because the banking authorities designed a complex set of interdependent agreements after months of negotiation and deliberation. Corbin describes the matter as if it involved only a dispute among trade creditors over the bankruptcy estate of a commercial debtor, with the Reserve Bank playing the part of the "greedy" lender unwilling to subsidize Franklin National with public funds at below-market rates of interest.

Corbin's "expert" witnesses at trial concluded that what was involved here was a political or philosophical debate as to whether the Treasury (which is the recipient of the Reserve Bank's earnings) or the FDIC is obliged to subsidize the subordinated creditors and stockholders of failed national banks with loans at an "appropriate" rate of interest below prevailing market rates. If a case can be made for such subsidization, which we doubt, it should be made in Congress.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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February 6, 1981

STATUTORY APPENDIX

Statutory Appendix

Bankruptcy Act

11 U.S.C. § 22(a) (1976):

> Any person, except a municipal, railroad, insurance, or banking corporation or a building and loan association, shall be entitled to the benefits of this title as a voluntary bankrupt.

11 U.S.C.A. § 109 (1979) (Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2557) provides in pertinent part:

* * *

> (b) A person may be a debtor under chapter 7 of this title only if such person is not—
>
> * * *
>
> (2) a domestic insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, or credit union. . . .

* * *

National Bank Act

12 U.S.C. § 191 (1976):

> Whenever any national banking association shall be dissolved, and its rights, privileges, and franchises declared forfeited, as prescribed in section 93 of this title, or whenever any creditor of any national banking association shall have obtained a judgment against it in any court of record, and made application, accompanied by a certificate from the clerk of the court stating that such judgment has been rendered and has remained unpaid for the space of thirty days, or whenever the Comptroller shall become satisfied of the insolvency of a national banking associa-

tion, he may after due examination of its affairs, in either case, appoint a receiver, who shall proceed to close up such association.

12 U.S.C. § 192 (1976) provides in pertinent part:

> On becoming satisfied, as specified in sections 131 and 132 of this title, that any association has refused to pay its circulating notes as therein mentioned, and is in default, the Comptroller of the Currency may forthwith appoint a receiver, and require of him such bond and security as he deems proper. Such receiver, under the direction of the comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct. Such receiver shall pay over all money so made to the Treasurer of the United States, subject to the order of the Comptroller, and also make report to the Comptroller of all his acts and proceedings.

* * *

12 U.S.C. § 194 (1976):

> From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their

legal representatives, in proportion to the stock by them respectively held.

Federal Reserve Act

12 U.S.C. § 341 (1976) provides in pertinent part:

Upon the filing of the organization certificate with the Comptroller of the Currency a Federal Reserve bank shall become a body corporate and as such, and in the name designated in such organization certificate, shall have power—

* * *

Third. To make contracts.

* * *

Seventh. To exercise by its boards of directors, or duly authorized officers or agents, all powers specifically granted by the provisions of this chapter and such incidental powers as shall be necessary to carry on the business of banking within the limitations prescribed by this chapter.

* * *

12 U.S.C. § 347 (1976) provides in pertinent part:

Any Federal reserve bank may make advances for periods not exceeding fifteen days to its member banks on their promissory notes secured by the deposit or pledge of bonds, notes, certificates of indebtedness, or Treasury bills of the United States, or by the deposit or pledge of debentures or other such obligations of Federal intermediate credit banks which are eligible for purchase by Federal reserve banks under section 350 of this title, or by the deposit or pledge of bonds issued under the provisions of subsection (c) of section 1463 of this title; and any Federal reserve bank may make advances for periods not exceeding ninety days to its member banks on their promissory notes secured by such notes, drafts, bills of exchange, or

bankers' acceptances as are eligible for rediscount or for purchase by Federal reserve banks under the provisions of this chapter or secured by such obligations as are eligible for purchase under section 355 of this title. All such advances shall be made at rates to be established by such Federal reserve banks, such rates to be subject to the review and determination of the Board of Governors of the Federal Reserve System.

* * *

12 U.S.C. § 347b (1976):

Any Federal Reserve bank, under rules and regulations prescribed by the Board of Governors of the Federal Reserve System, may make advances to any member bank on its time or demand notes having maturities of not more than four months and which are secured to the satisfaction of such Federal Reserve bank. Each such note shall bear interest at a rate not less than one-half of 1 per centum per annum higher than the highest discount rate in effect at such Federal Reserve bank on the date of such note. Notwithstanding the foregoing, any Federal Reserve bank, under rules and regulations prescribed by the Board of Governors of the Federal Reserve System, may make advances to any member bank on its time notes having such maturities as the Board may prescribe and which are secured by mortgage loans covering a one-to-four family residence. Such advances shall bear interest at a rate equal to the lowest discount rate in effect at such Federal Reserve bank on the date of such note.

Federal Deposit Insurance Act

12 U.S.C. § 1819 (1976) provides in pertinent part:

Upon June 16, 1933, the Corporation shall become a body corporate and as such shall have power—

* * *

Third. To make contracts.

* * *

Seventh. To exercise by its Board of Directors, or duly authorized officers or agents, all powers specifically granted by the provisions of this chapter, and such incidental powers as shall be necessary to carry out the powers so granted.

* * *

12 U.S.C. § 1821 (1976) provides in pertinent part:

* * *

(c) **Corporation as receiver**

Not withstanding any other provision of law, whenever the Comptroller of the Currency shall appoint a receiver other than a conservator of any insured national bank or insured District bank, or of any non-insured national bank or District bank hereafter closed, he shall appoint the Corporation receiver for such closed bank.

(d) **Powers and duties of Corporation as receiver**

Notwithstanding any other provision of law, it shall be the duty of the Corporation as such receiver to cause notice to be given, by advertisement in such newspapers as it may direct, to all persons having claims against such closed bank pursuant to section 193 of this title; to realize upon the assets of such closed bank, having due regard to the condition of credit in the locality; to enforce the individual liability of the stockholders and directors thereof; and to wind up the affairs of such closed bank in conformity with the provisions of law relating to the liquidation of closed national banks, except as herein otherwise provided. The Corporation as such receiver shall pay to itself for its own account such portion of the

amounts realized from such liquidation as it shall be entitled to receive on account of its subrogation to the claims of depositors, and it shall pay to depositors and other creditors the net amounts available for distribution to them. The Corporation as such receiver, however, may, in its discretion, pay dividends on proved claims at any time after the expiration of the period of advertisement made pursuant to section 193 of this title, and no liability shall attach to the Corporation itself or as such receiver by reason of any such payment for failure to pay dividends to a claimant whose claim is not proved at the time of any such payment. With respect to any such closed bank, the Corporation as such receiver shall have all the rights, powers, and privileges now possessed by or hereafter granted by law to a receiver of a national bank or District bank and notwithstanding any other provision of law in the exercise of such rights, powers, and privileges the Corporation shall not be subject to the direction or supervision of the Secretary of the Treasury or the Comptroller of the Currency.

12 U.S.C. § 1823 (1976) provides in pertinent part:

* * *

(d) **Sale of assets to Corporation**

Receivers or liquidators of insured banks closed on account of inability to meet the demands of their depositors shall be entitled to offer the assets of such banks for sale to the Corporation or as security for loans from the Corporation, upon receiving permission from the appropriate State authority in accordance with express provisions of State law, in the case of insured State banks. The proceeds of every such sale or loan shall be utilized for the same purposes and in the same manner as other funds realized from the liquidation of the assets of such banks. In any case where prior to Sept. 21, 1950, the Comptroller of the Currency has appointed a receiver of a closed

national bank other than the Corporation, he may, in his discretion, pay dividends on proved claims at any time after the expiration of the period of advertisement made pursuant to section 193 of this title, and no liability shall attach to the Comptroller of the Currency or to the receiver of any such national bank by reason of any such payment for failure to pay dividends to a claimant whose claim is not proved at the time of any such payment. The Corporation, in its discretion, may make loans on the security of or may purchase and liquidate or sell any part of the assets of an insured bank which is now or may hereafter be closed on account of inability to meet the demands of its depositors, but in any case in which the Corporation is acting as receiver of a closed insured bank, no such loan or purchase shall be made without the approval of a court of competent jurisdiction.

(e) **Loans on assets as security**

Whenever in the judgment of the Board of Directors such action will reduce the risk or avert a threatened loss to the Corporation and will facilitate a merger or consolidation of an insured bank with another insured bank, or will facilitate the sale of the assets of an open or closed insured bank to and assumption of its liabilities by another insured bank, the Corporation may, upon such terms and conditions as it may determine, make loans secured in whole or in part by assets of an open or closed insured bank, which loans may be in subordination to the rights of depositors and other creditors, or the Corporation may purchase any such assets or may guarantee any other insured bank against loss by reason of its assuming the liabilities and purchasing the assets of an open or closed insured bank. Any insured national bank or District bank, or the Corporation as receiver thereof, is authorized to contract for such sales or loans and to pledge any assets of the bank to secure such loans.

No agreement which tends to diminish or defeat the right, title or interest of the Corporation in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the Corporation unless such agreement (1) shall be in writing, (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) shall have been, continuously, from the time of its execution, an official record of the bank.

Regulation A

12 C.F.R. § 201.2(e) (1979):

(e) **Other credit to member banks.** (1) In the event of unusual or emergency circumstances resulting from national, regional, or local difficulties, Federal Reserve credit beyond that contemplated under paragraph (c) of this section is available.

(2) Federal Reserve credit is also available for protracted assistance where there are exceptional circumstances or practices involving only a particular member bank. A special rate apart from rates charged for lending to member banks under other provisions of this Part may be established by Federal Reserve Banks subject to review and determination by the Board of Governors and applied to such credit. The special rate may apply to member banks borrowing for prolonged periods (such as for more than eight weeks) and in significant amounts (such as when the loan has exceeded on average the amount of the borrowing bank's required reserves) because of financial strains arising from particular circumstances or practices affecting the individual bank—including sustained deposit

drains, impaired access to money market funds, or sudden deterioration in loan repayment performance. In no case should the special loan rate to member banks exceed the rate established for loans to nonmembers under 12 U.S.C. 347(c).